COURT, U. S.

Supreme Court, U. S.
FILED
NOV 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-561

NELSON RAY RICHARDS,

Petitioner

vs.

THE STATE OF NORTH CAROLINA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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Nelson Ray Richards, petitioner herein, prays that a writ of certiorari issue to review the judgment of the North Carolina Court of Appeals, an appeal therefrom having been dismissed by the Supreme Court of North Carolina by judgment entered August 13, 1974.

CITATION TO OPINION BELOW

The original opinion of the Supreme Court of North Carolina dated August 13, 1974, has been reported in 285 N.C. 667. This opinion appears in the Appendix hereto as Exhibit A.

The judgment of the North Carolina Supreme Court dismissed the appeal of the petitioner from an adverse

opinion of the North Carolina Court of Appeals, which opinion is hereto attached as Exhibit B. The opinion of the North Carolina Court of Appeals is reported in 21 N.C. App. 686, 205 S.E. 2d 369.

JURISDICTION

The judgment of the Supreme Court of North Carolina is dated August 13, 1974, and was entered on the same day. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the State can violate the petitioner's right of confrontation, guaranteed by the constitution, by introducing into evidence statements, which prejudiced the petitioner, made by a co-defendant, who did not take the witness stand?

2. Whether the error was harmless beyond a reasonable doubt?

STATEMENT OF CASE

This action was commenced by filing a Bill of Indictment which charged the petitioner, Nelson Ray Richards, with conspiracy with Claude Vance Cooley, Harvey Allen Ward and John Maxwell Harold, Jr. to rob Walter Herbert Hortor., Jr. with a pistol. The conspiracy indictment is as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Nelson Ray Richards late of the County of Franklin on the 4th day of November 1970 with force and arms, at and in the County aforesaid, did unlawfully, willfully and feloniously agree, plan, conspire and confederate with Claude Vance Cooley, Harvey Allen Ward and John

Maxwell Harold, Jr. each with the other, and with others, to unlawfully, willfully and feloniously steal, take and carry away the personal property of Walter Herbert Horton, Jr., to wit: merchandise, chattels, monies and other valuable securities from the person and possession of Walter Herbert Horton, Jr. while having in their possession and with the use of firearms and dangerous weapons, to wit: pistols, whereby the life of Walter Herbert Horton, Jr. would be endangered and threatened against the form of the statute in such case made and provided and against the peace and dignity of the State." R pp 3-4.

The petitioner, Nelson Ray Richards, was also charged with the robbery of the same Walter Herbert Horton, Jr. on the same date as the conspiracy charge. The Bill of Indictment charging the robbery is as follows:

"THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Nelson Ray Richards late of the County of Franklin on the 4th day of November 1970, with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously, having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a pistol whereby the life of Walter Herbert Horton, Jr. was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away U. S. lawful currency, bonds and travelers checks of the value of approximately $30,000.00 from the presence, person, place of business and residence of Walter Herbert Horton, Jr. contrary to the form of the statute in such case made and provided and against the peace and dignity of the State." R pp 4-5.

Claude Vance Cooley was charged, in connection with the same robbery, in separate Bills of Indictment with conspiracy to commit armed robbery, accessory before the fact of armed robbery and accessory after the fact of armed robbery. R pp 1-2.

Another co-defendant, John Maxwell Harold, was charged in separate Bills of Indictment with conspiracy to commit armed robbery and armed robbery. The Bills of Indictment against John Maxwell Harold were identical with the Bills of Indictment set forth as against the petitioner with the exception of the name of John Maxwell Harold in lieu of the petitioner's name and pertained to the same robbery and same conspiracy to commit robbery. R pp 6-7.

The cases against the petitioner, Harold and Cooley were consolidated for the purpose of trial upon the motion of the Solicitor for the State. R p 2.

The State offered in evidence the testimony of accomplice witness, Harvey Allen Ward. Accomplice witness Ward's testimony was the only testimony against the petitioner. Accomplice witness Ward admitted a long criminal record and that he was testifying in the hope of immunity. R pp 55-86.

The petitioner, Richards, took the stand and categorically denied any participation in the conspiracy to rob Walter Herbert Horton, Jr. on November 4, 1970 as charged or that he participated in the robbery of Walter Herbert Horton, Jr. as charged. R pp 111, 121.

The petitioner testified that he was in Atlanta, Georgia on November 4, 1970. R p 120. He placed on the stand a witness, Norman Pike, who corroborated the petitioner in his testimony that he was in Atlanta, Georgia

on November 4, 1970 and thus could not have been in the robbery as testified by accomplice witness Ward. R pp 130-132.

The State greatly prejudiced the petitioner, Richards, and bolstered its case of conspiracy, which depended completely upon the accomplice testimony of Ward, by introducing evidence, by the accomplice Ward, of telephone admissions made by the co-defendant Cooley. These admissions by the co-defendant Cooley, over the telephone, incriminated and prejudiced the petitioner and corroborated the impeached testimony of accomplice witness Ward. R pp 70-76.

The co-defendant, Cooley, did not take the stand as a witness and was unavailable for cross-examination by the petitioner Richards. R p 162.

The petitioner objected to each and every telephone conversation between the co-defendant, Cooley, and accomplice witness Ward. R pp 70-75. The petitioner further contended at length in the North Carolina Court of Appeals that the admission of these telephone conversations between the co-defendant, Cooley, and accomplice witness Ward deprived the petitioner of his right to confrontation of witnesses as guaranteed by the Sixth Amendment to the Constitution to the United States, made obligatory on the states by the Fourteenth Amendment. (Point Three of petitioner's brief filed in the North Carolina Court of Appeals. R pp 17-26).

The petitioner's brief filed in the North Carolina Court of Appeals stated: "These inculpatory statements and admissions made by the defendant Cooley contained equally prejudicial statements involving the defendant Richards and deprived the defendant Richards of his right of confrontation of witnesses as guaranteed by the Sixth

Amendment to the Constitution of the United States made obligatory on the states by the Fourteenth Amendment." (Petitioner's brief filed in the North Carolina Court of Appeals, R pp 20-21).

The petitioner cited to the North Carolina Court of Appeals *Bruton vs United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) in support of his contention that the petitioner's right of confrontation, guaranteed by the Sixth Amendment of the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States, had been violated even though the Court instructed the jury to disregard the confession or admission as against the co-defendant who was not present at the time the same was made.

The jury rendered a verdict of not guilty as to the charge of armed robbery against the petitioner and a verdict of guilty of conspiracy to commit armed robbery against the petitioner. R pp 169-170.

The co-defendant, John Maxwell Harold, Jr., was found guilty of armed robbery and conspiracy to commit armed robbery as charged. R p 170.

The co-defendant, Claude Vance Cooley, was found not guilty on all charges against him. R p 170.

The petitioner received a sentence for a term of ten years in the State's prison. R p 171.

The co-defendant, John Maxwell Harold, Jr., received a sentence of not less than 24 years and not more than 30 years in the State's prison on the charge of armed robbery and a term of not less than one and not more than ten years in the State's prison on the charge of con-

spiracy to commit armed robbery, to begin at the expiration of the sentence imposed on the charge of armed robbery. R pp 172-173.

The petitioner and co-defendant, Harold, appealed to the North Carolina Court of Appeals where the convictions and sentences were affirmed. Appendix Exhibit B.

The petitioner appealed to the Supreme Court of North Carolina on the grounds that the petitioner's right of confrontation, guaranteed by the Sixth Amendment to the Constitution of the United States, made obligatory on the states by the Fourteenth Amendment, was violated by the admission of the telephonic statements by a co-defendant, who did not take the stand, and that the statements were made by the co-defendant out of the presence of the petitioner and were highly prejudicial to the petitioner and that the question had been passed upon and decided erroneously by trial Court and the North Carolina Court of Appeals.

The petitioner's notice of appeal to the Supreme Court of North Carolina is hereto attached and marked Appendix Exhibit C.

The petitioner, to support his appeal to the Supreme Court of North Carolina, filed a supplementary brief in which he pointed out to the Supreme Court of North Carolina his contention that the Court had violated his right of confrontation, guaranteed by the sixth amendment to the Constitution of the United States, made obligatory upon the states, and again cited *Bruton vs United States, supra,* and distinguished *Harrington vs California,* 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), and *Schnabel vs Florida,* 405 U.S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972) (Petitioner's supplementary brief upon appeal to the Supreme Court of North Carolina, pp 2-6).

On August 13, 1974, upon motion of the Attorney General for the State of North Carolina, the petitioner's appeal was dismissed along with his petition for writ of certiorari, which was based upon non-constitutional errors. Appendix Exhibit A.

RELEVANT FACTS

The alleged victim of the robbery, Walter Herbert Horton, Jr., testified at length and in detail as to the robbery at his home in Louisburg, North Carolina on November 4, 1970. According to Horton, there were only two men involved in the robbery, neither of whom were identified as the petitioner, Nelson Ray Richards, by Walter Herbert Horton, Jr. R pp 41-54.

The petitioner's, Nelson Ray Richards, only connection with the robbery is disclosed by the testimony of Harvey Allen Ward, who was deeply involved himself, and who testified for the State because the prosecution granted him immunity in exchange for his testimony. R pp 55-86.

According to the evidence of this self-confessed robber, who was attempting to buy his way out of the charges against him, the petitioner, Nelson Ray Richards, was involved in the planning of the robbery and was waiting in a car outside while the actual robbery was being perpetrated by accomplice witness, Harvey Allen Ward and defendant, John Maxwell Harold, Jr. Testimony by accomplice Ward further linked the petitioner, Nelson Ray Richards, with the conspiracy and the possession of the bonds stolen from Walter Herbert Horton on the night of November 4, 1970. R pp 55-86.

The petitioner, Nelson Ray Richards, was found to be in possession of bonds stolen from Walter Herbert Horton, Jr., while operating his automobile on Highway I-85 in the vicinity of Durham on December 13, 1970. R pp 95-97.

The apprehension of the petitioner, Richards, in possession of the stolen bonds on December 13, 1970 had no probative value in the proving of the conspiracy, of which the petitioner Richards was convicted without the testimony of accomplice Harvey Allen Ward. R pp 55-86, 95-97.

The State greatly prejudiced the petitioner Richards and bolstered its case of conspiracy, which depended completely upon the accomplice testimony of Ward, by introducing evidence by the accomplice Ward of telephone admissions made by the co-defendant Cooley. These admissions by the co-defendant Cooley, over the telephone, incriminated and prejudiced the petitioner Richards. The co-defendant Cooley did not take the stand as a witness and was unavailable for cross examination by the petitioner Richards. R pp 70-76.

The petitioner, Nelson Ray Richards, took the stand and denied any participation in the conspiracy to rob Walter Herbert Horton, Jr. on November 4, 1970 as charged or that he participated in the robbery of Walter Herbert Horton, Jr. as charged. R pp 111, 121.

The petitioner Richards stated that he did not come to North Carolina with accomplice Ward or co-defendant Harold on November 3, 1970 in a Lincoln Continental automobile that Ward claimed to own. That he worked on the lot of Forrest Rosenberry on November 3, 1970, which was Election Day. That he checked into the New Mark Inn at 5:35 P.M. on November 4, 1970. R pp 119-121.

The petitioner Richards further testified that on November 4, 1970, he sold a Volkswagen to a retired man from the Army and that evening had dinner with Norman Pike. That he was with Mr. Pike until approximately

11:00 or 12:00 and spent that night at the motel and produced a receipt to corroborate him. Governor Maddox was running for Lieutenant Governor in that election and all these events testified to by the petitioner Richards took place in Atlanta, Georgia. R p 120.

The petitioner Richards further testified that he did not even know John Harold until he met him in 1971 at Sans Souci in Atlanta. R pp 121, 127.

The petitioner Richards further testified that he got the bonds, later found in his possession in his automobile near Durham, North Carolina, from accomplice witness Harvey Allen Ward, who gave him the bonds to hold as security for money that Ward owed him. The bonds were gotten from Ward at a poker game in North Carolina. R pp 122-125.

When the bonds were seized by the officers, they were not concealed and were lying there on top. R p 125.

The petitioner's testimony that he was in Atlanta at the time the alleged robbery took place was corroborated by Norman Pike who testified that he saw the petitioner, Richards, on the lot of Forrest Rosenberry on Peachtree Street the first part of November. That they had dinner that night at the New Mark Inn in Atlanta near the airport. That Richards got there about 6:30 P.M or 7:30 P.M. That they met in the lounge and had a couple of drinks and went downtown to dinner. That he was with him that night about three or four hours. That he doesn't know how Richards got back to the motel. That the reason he knows that the meeting took place in early November is that he and Richards were discussing the election that had just taken place in which Lester Maddox had been elected Lieutenant Governor. It could have been election day or the day after. R pp 130-132.

The statements and admissions of the petitioner, which were allowed into evidence as against the co-defendant Cooley, who did not take the stand, are shown on R pp 70-75 as follows:

"I received a phone call from the man who said he was the man in the Pontiac. That was two or three days after the robbery. At that time I was at my house in Atlanta."

Q. And in your own words, state what happened.

EACH DEFENDANT OBJECTS.

OVERRULED BY THE COURT.

A. Well, the phone rang, I picked it up, the man said, "this is C.V.," the man from up in Louisburg," and I said, "yeah, how did you get this phone number," I said, "how did you know my name?" He said, "well, Nelson left his address book laying here and I found it in that." And he said he wanted to know what was going on, said — he asked "how much money was in there?", and I said about fifteen hundred dollars and some bonds. He said, "well" — I didn't tell him about the other six thousand dollars. He said, "well, the paper up here said it was thirty or forty thousand dollars." I said, "well, Nelson has got these bonds, there was fifteen, twenty or twenty-five thousand dollars." He said, "well, I want to make sure that I get my part of the money." He said, "I think Nelson might try and screw out of them," told me that he would be back in touch with me and he left me a phone number in case I heard from Nelson.

EACH DEFENDANT MOVES TO STRIKE ANSWER.

MOTION DENIED.

RICHARDS' EXCEPTION NO. 11

HAROLD'S EXCEPTION NO. 9

He did leave me a phone number. I did not have any further conversation with that person at that time. I did have a conversation with this same person again at a later time. He called me and identified himself the same way. "This is C.V., the guy from Louisburg", in return to a call that I made up here.

I called the number he had given me. A lady answered. I said "is C.V. there?" She said, "no", and I said "is this the C.V. with the orange Pontiac" and she said "yes". I said "do you know when he will be back", and she said, "no". I said "fine". The next day I called the same number and I called person to person for C.V. Cooley. The lady that answered the phone said he wasn't there. The operator left the number for him to call me back. She left my number. After I left my number with the lady for him to call me back, the man called back, said "this is C.V., the man from Louisburg." He called back the next day.

Q. What, if anything, did this person tell you?

EACH DEFENDANT OBJECTS. OVERRULED.

A. He said that Nelson was flying into Atlanta with a girl, and he gave me the time of the flight and he said he thought he screwed us out of the money for the bonds. He said, "you need to get out to the airport to find out what is going on."

RICHARDS' EXCEPTION NO. 12

HAROLD'S EXCEPTION NO. 10

I went to the airport and Nelson Richards came in on the airplane.

Q. All right, what other conversation did you have with this man at that time?

EACH DEFENDANT OBJECTS.

COURT: OVERRULED as to the defendant Cooley. Objection SUSTAINED as to the defendants Harold and Richards, and the jury has previously been instructed not to consider that.

A. I called him back after seeing Nelson at the airport and told him I had seen Nelson out there and Nelson claimed that he had lost the bonds.

RICHARDS' EXCEPTION NO. 13

HAROLD'S EXCEPTION NO. 11

Q. How did you call?

A. I called the number —

DEFENDANT COOLEY OBJECTS.

OVERRULED BY THE COURT.

A. I called the number that the man had given me who had identified himself as "C.V., the man from Louisburg."

DEFENDANTS HAROLD AND RICHARDS MOVE TO STRIKE ANSWER.

DEFENDANT COOLEY OBJECTS, MOVES TO STRIKE ANSWER.

COURT: Again, members of the jury, any statements by the person on the telephone as testified by this witness are to be considered only against the

defendant Cooley and not against the defendants Harold and Richards.

RICHARDS' EXCEPTION NO. 14

HAROLD'S EXCEPTION NO. 12

Q. Tell us what happened in that conversation.

A. I just told him that I had gotten in a hassel with Nelson at the airport and had slapped him and he had called the police and had me taken away, and I said that it looked like he wasn't going to give us the money for the bonds.

EACH DEFENDANT MOVES TO STRIKE ANSWER.

COURT: Motion allowed as to Harold and Richards, DENIED as to Cooley.

RICHARDS' EXCEPTION NO. 15

HAROLD'S EXCEPTION NO. 13

Q. What, if anything, did the other person say?

EACH DEFENDANT OBJECTS.

COURT: Objection OVERRULED as to Cooley, SUSTAINED as to Harold and Richards.

A. He said that he would get the money. He said that Nelson wasn't going to screw us out of it, that he would be back in touch with us, that he wasn't going to let Nelson beat us out of the money.

RICHARDS' EXCEPTION NO. 16

HAROLD'S EXCEPTION NO. 14

Q. Did you ever have any further telephone conversations with this person at any time?

A. About nine months ago.

Q. When was that?

EACH DEFENDANT OBJECTS.

COURT: Sustained as to the defendants Richards and Harold and OVERRULED as to the defendant Cooley, and again members of the jury, any conversation this witness may testify that he had with the person who identified himself as "C.V." on the phone may be considered only against the defendant Cooley and not against the defendants Richards and Harold.

RICHARDS' EXCEPTION NO. 17

HAROLD'S EXCEPTION NO. 15

Q. Where were you when you had a conversation with the person again?

A. At my house.

Q. All right, now, tell us how that came about.

EACH DEFENDANT OBJECTS.

COURT: SUSTAINED as to Harold and Richards and OVERRULED as to Cooley. Go ahead.

A. The man called, said this was "C.V." and he said "did you know that we have all four been indicted?" I said, "how do you know that?" and he said, "some friend of Collins had told him, a friend Mike Collins, and he had found out that we had all been under indictment and we were all going to be tried."

RICHARDS' EXCEPTION NO. 18

HAROLD'S EXCEPTION NO. 16

Q. Was there any further conversation?

EACH DEFENDANT OBJECTS.

OVERRULED BY THE COURT as to Cooley.

SUSTAINED BY THE COURT as to Richards and Harold.

A. Then he asked me where John Harold was, and I said John was in Charlotte, and then he said he would find out more about it, and he would be back in touch with me. He just said "keep your mouth shut."

RICHARDS' EXCEPTION NO. 19

HAROLD'S EXCEPTION NO. 17

He didn't say anything else that I can recall at this time, other than we just discussed, you know, what he had heard and he just talked about not saying anything. He said, you know, "if you are in any kind of bad way, just let me know" or something like that, but "don't open your mouth at all."

I had another conversation with this same person. It was several days after that, five, six, seven days, I am not exactly sure. This was after that first phone call. I was at the same number at my house. He called me.

Q. What, if anything, was said on that occasion?

EACH DEFENDANT OBJECTS.

COURT: OBJECTION SUSTAINED as to Richards and Harold. OVERRULED as to Cooley.

A. He said that he had found out that Collins

was going to testify against us and he said we might have to have him killed.

RICHARDS' EXCEPTION NO. 20

HAROLD'S EXCEPTION NO. 18

Q. Did you have any further conversation with him?

A. Yeah, he said that, "did I think that John Harold would say anything?" I said, "I didn't think he would," and he said, "I didn't think he would," and he said, "well, if he does, you are going to have to take care of him because I can't do anything outside of North Carolina."

EACH DEFENDANT OBJECTS.

COURT: SUSTAINED as to Harold and Richards, DENIED as to Cooley.

RICHARDS' EXCEPTION NO. 21

HAROLD'S EXCEPTION NO. 19

DEFENDANT COOLEY OBJECTS.

OVERRULED BY THE COURT.

DEFENDANTS HAROLD AND RICHARDS OBJECT.

SUSTAINED as to defendants Harold and Richards.

A. He said, "we are all going to go to jail, and if anybody did any talking, that we would all be in the Raleigh State Prison, the North Carolina State Prison." He said that his brother or somebody was a guard there and he said that we wouldn't last in there if we said anything against him.

DEFENDANT COOLEY MOVES TO STRIKE ANSWER.

MOTION DENIED BY THE COURT.

DEFENDANTS HAROLD AND RICHARDS MOVE TO STRIKE THE ANSWER.

COURT: Don't consider the action as against Harold and Richards.

RICHARDS' EXCEPTION NO. 22

HAROLD'S EXCEPTION NO. 20

REASONS FOR GRANTING WRIT

The decision of the North Carolina Supreme Court dismissing the appeal of petitioner, from the decision of the North Carolina Court of Appeals, is in conflict with the applicable decision of this Court.

1. The decision against the petitioner violated the right of the petitioner, to confrontation guaranteed by the Sixth Amendment to the Constitution of the United States, made obligatory upon the states by the Fourteenth Amendment to the Constitution of the United States.

The telephonic statements by co-defendant Cooley, who did not take the stand, were made out of the presence of the petitioner, as set out at pp 12-16 of the petitioner's statement of relevant facts in this petition. These statements were extremely damaging to the petitioner and so obviously violated his right of confrontation that this point was conceded, without declaration, to be error by the North Carolina Court of Appeals. Appendix Exhibit B. The admission of this evidence was error even though the jury was instructed to disregard the same as to the petitioner.

The decision against the petitioner in this action is completely in conflict with the decision of this Court in *Bruton vs United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

Bruton vs United States, supra, was a trial in Federal Court. The defendant Bruton and the co-defendant Evans were tried in a joint trial. The confession of the co-defendant Evans was admitted into evidence with an instruction that it was to be considered only against the defendant Evans. The confession of Evans admitted that he and the defendant Bruton committed armed robbery. The United States Supreme Court in reversing the conviction of Bruton, said:

> "Despite the concedingly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limited instructions as an adequate substitute for petitioner's constitutional right of cross examination. The effect is the same as if there had been no instruction at all."

In the case of *Bruton vs United States, supra*, this Court further stated:

> "A defendant may be prejudiced by the admission in evidence against the co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross examination, if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice."

The Sixth Amendment to the Constitution of the United States is made obligatory on the states by the Fourteenth Amendment. *Pointer vs the State of Texas*, 380

U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The decision of this Court in *Bruton vs United States, supra,* was as binding upon this action as upon proceedings in the Federal Court.

2. The error committed by the Court, in violation of the petitioner's right of confrontation, guaranteed by the Sixth Amendment of the Constitution of the United States, was not harmless error beyond a reasonable doubt.

The North Carolina Court of Appeals assumed, without declaring, that it was error to admit accomplice Ward's version of the conversation between him and the co-defendant Cooley. Appendix Exhibit B.

The decision of the North Carolina Court of Appeals, which is the law of the case because the Supreme Court of North Carolina dismissed the petitioner's appeal, completely nullifies the letter and spirit of *Bruton vs United States, supra.*

If the decision against the petitioner is not reversed, the North Carolina Court will never again follow *Bruton vs United States, supra.* In each future case it will find harmless error beyond a reasonable doubt and affirm the conviction.

The North Carolina Court of Appeals was apparently greatly influenced in its finding, that the admission of these telephonic conversations with co-defendant Cooley were harmless beyond a reasonable doubt as to the defendant Richards, because the co-defendant Cooley was acquitted. This reasoning completely ignores that the telephone conversations were the only evidence that the State had as to the co-defendant Cooley. This reasoning also ignores that the jury's verdicts, demonstrated that they would not convict the co-defendant Cooley or the

defendant Richards on the uncorroborated evidence of the accomplice witness Ward.

The jury did not believe the testimony of the accomplice witness Ward as to the details of the robbery or they would have convicted the defendant Richards of the robbery charge in addition to the conspiracy charge. These telephonic statements by co-defendant Cooley gave meaning, adverse to the defendant Richards, to the finding of the stolen securities in the defendant's automobile on I-85 in Durham, North Carolina, December 13, 1970.

Without the erroneously admitted statements by the co-defendant Cooley, the finding of the stolen securities in the defendant's automobile on December 13, 1970 had no relation to the conspiracy charge whatsoever. But with these telephonic statements by the co-defendant Cooley the jury was able to link the possession of the stolen securities, by the defendent Richards, with the alleged conspiracy.

Without these telephonic statements by the co-defendant Cooley, the state would not have been able to convict the petitioner Richards of any charge whatsoever concerning the stolen securities.

The reasoning of the North Carolina Court of Appeals that there is no reasonable probability that the statements the witness Ward attributed to co-defendant Cooley contributed to the conviction of the petitioner Richards is not consistent with the verdict of the jury. Without these telephonic statements by the co-defendant Cooley, the jury would have placed no credence in the accomplice witness Ward's statements that he met Nelson Richards at the airport, and that Nelson Richards claimed he had lost the bonds and caused Ward to be arrested after Ward slapped Nelson Richards at the airport.

The petitioner Richards, with logic and reason, contends that had not these statements by the co-defendant Cooley been introduced in evidence the jury would have failed to believe the witness Ward on the conspiracy charge just as they failed to believe his detailed account of the robbery. R pp 55-86.

Certainly, the error here was not harmless beyond a reasonable doubt.

All of the cases which have held that the error of admission of statements or confession of a co-defendant, tried jointly and who did not take the stand, was harmless error beyond a reasonable doubt are based upon evidence more overwhelming than in this case or upon statements by the defendant which eliminated the importance of the evidence.

The defendant Richards particularly calls attention of this Court to its decisions in *Harrington vs California,* 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) and *Schnabel vs Florida,* 405 U.S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972).

In *Harrington vs California, supra,* the error was considered harmless beyond a reasonable doubt because, in addition to the accomplice testimony of Rome, Harrington himself agreed that he was at the scene of the crime and the others testified that he had a gun and was an active participant. On this basis, the Court said that the confessions of Cooper and Bostick, who did not take the stand, were merely cumulative.

In the case of *Schnabel vs Florida, supra,* the error of admitting a statement or confession of a co-defendant, who did not take the stand, was found to be harmless error beyond a reasonable doubt where the defendant had also

given a confession which admitted complete participation in the crime in addition to being present at the scene of the crime. Actually, the defendant Schnabel's confession went further and incriminated him more than the statements or confession of the co-defendant, who did not take the stand.

It, therefore, can clearly be seen from the cases of *Harrington vs California, supra,* and *Schnabel vs Florida, supra,* that this Court does not countenance a finding of harmless error beyond a reasonable doubt unless such a conclusion can be arrived at clearly and logically.

Certainly, there was error committed by the Court in the admission of these statements which by their number and substance, completely devastated the petitioner Richards and linked him with the conspiracy, which involved the stolen securities found in his possession on December 13, 1970. Surely, these errors were not harmless beyond a reasonable doubt when tested by the authoritative decisions, and the action of the jury, in acquitting the petitioner Richards on the robbery charge and finding him guilty on the conspiracy charge.

The petitioner Richards took the stand in his own behalf and denied that he had participated in the robbery of Walter Herbert Horton, Jr. or the conspiracy to rob him. R pp 111-128.

The petitioner's testimony that he was in Atlanta, Georgia at the time the alleged robbery took place was corroborated by Norman Pike. R pp 130-132.

The witness, Harvey Allen Ward, who implicated the petitioner Richards in the conspiracy charge, was impeached as to credibility by his long criminal record and his admission he was testifying against the petitioner

Richards because the prosecution granted him immunity in exchange for his testimony. R pp 55-57.

Without Ward's telephone conversation with Cooley, (R pp 71-73) the incident at the Atlanta airport was not connected with the conspiracy to rob, but was consistent with petitioner's statement that Ward was trying to get the bonds that he had given the petitioner in the poker game. R pp 123-125, 127.

Under these circumstances there can be no doubt that the statements attributed to the co-defendant Cooley greatly corroborated this highly questionable witness for the State.

Certainly, it cannot be said that the erroneously admitted statements of the co-defendant Cooley, who did not take the stand, might not have contributed to the petitioner Richards' conviction of conspiracy, it cannot be said that the error of admitting the statements was harmless beyond a reasonable doubt.

The Court of Appeals apparently lost sight of this principle and found harmless error beyond a reasonable doubt because there was other evidence by the thoroughly impeached Ward.

It is not sufficient to say that there is other evidence. The other evidence must be unimpeached evidence of sufficient weight that the Court may say that the erroneously admitted statements did not contribute to the conviction.

CONCLUSION

For the foregoing reasons a writ of certiorari to re-

view the judgment of the North Carolina Court of Appeals should be allowed.

Respectfully submitted,

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APPENDIX

EXHIBIT A

NO. 31 NINTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1974

STATE OF NORTH CAROLINA	)	JUDGMENT
	)	DISMISSING
	)	APPEAL AND
V	)	DENYING
	)	CERTIORARI
	)	
NELSON RAY RICHARDS and JOHN MAXWELL HAROLD	)	(749SC212)

This matter came on to be considered upon motion of the Attorney General to dismiss the appeal of the defendants and upon defendants' petition for writ of certiorari; upon consideration whereof, it is adjudged by the Court here, that the motion to dismiss the appeal be allowed; that petition for writ of certiorari be denied, and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed;

And it is considered and adjudged further that the defendant Nelson Ray Richards and surety to the appeal bond, U. S. Fidelity & Guaranty Company, do pay one half the clerk's cost of $9.00 and that defendant John Maxwell Harold do pay one half the clerk's cost amounting to $9.00 and execution issue therefor.

Witness my hand the seal of the Supreme Court, this 13th day of August, 1974.

Adrian J. Newton

Clerk of the Supreme Court of
North Carolina

EXHIBIT B

No. 749SC212 NINTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 1974

STATE OF NORTH CAROLINA

v. *From Franklin*

NELSON RAY RICHARDS and
JOHN MAXWELL HAROLD

On certiorari to review trial before McKinnon, Judge, at the April-May 1973 Session of Superior Court held in Franklin County.

Defendants were indicted for conspiracy to commit armed robbery and armed robbery. C. V. Cooley was indicted for accessory before and after the fact of armed robbery and conspiracy to commit armed robbery.

The State's evidence tended to show that on 4 November 1970, two men entered the Louisburg home of Walter H. Horton, Jr. and forced Horton to open his safe. One of the men held a gun on Horton, while the other ransacked the house. The men, one on whom Horton identified as defendant John Maxwell Harold, took about $30,000.00 worth of bonds, silver coins, cash and travelers checks.

On 13 December 1970, Durham County police officers stopped an automobile owned and operated by defendant Nelson Ray Richards. Acting pursuant to a search warrant issued in a matter unrelated to that pre-

sently before the court, the officers searched the automobile. They found two debentures which were identified as belonging to Horton.

In early 1972, Georgia law enforcement officials and SBI agent Roger Allen talked with Harvey Ward in Atlanta. Ward told the officers that Cooley and Richards had planned the robbery and that he and Harold had been recruited to help Richards carry it out. Some of Horton's property was recovered from a safety deposit box Ward rented in Atlanta. Ward was a witness for the State and gave evidence tending to show that all defendants were guilty as charged.

Although defendant Harold did not testify in his own behalf, his wife testified that in November 1970, Harold was living in Charlotte and was there on the date of the Louisburg robbery.

Defendant Richards, who said he lived in Jonesboro, Georgia in November 1970, claimed that he had won the debentures found in his automobile in a poker game in Durham on 6 December 1970. His evidence also tended to show he was staying in an Atlanta motel when the Horton robbery occurred.

Cooley was acquitted. Richards was found guilty of conspiracy to commit armed robbery and sentenced to an active prison term of 10 years. Harold was found guilty of armed robbery and conspiracy to commit armed robbery. He was sentenced to 24-30 years for the first offense and 10 years on the second. The terms are to run consecutively. We allowed certiorari to allow both defendants appellate review.

Attorney General Robert Morgan by Lester V. Chalmers, Jr., Assistant Attorney General, for the State.

Blanchard, Tucker, Denson & Cline by Irvin B. Tucker, Jr., and Tharrington, Smith & Hargrove by Roger W. Smith, attorneys for defendant appellants.

VAUGHN, Judge. Defendant Richards contends that the court's instructions to the jury were erroneous in that they would permit defendant Richards' conviction for conspiracy "if he conspired with himself or if the defendant Ward conspired with Harold or Cooley with no connection with the defendant Richards at all." This contention involves the following portion of the court's charge:

> "On the charge of conspiracy to commit an armed robbery against the defendant Nelson Ray Richards, I instruct you if you are satisfied from the evidence beyond a reasonable doubt that there was an unlawful meeting of the minds between Nelson Ray Richards and C. V. Cooley, John Maxwell Harold and Harvey Allen Ward, or any one or more of those persons, to commit the crime of armed robbery upon Mr. Horton, if you find those to be the facts beyond a reasonable doubt, the defendant Nelson Ray Richards would be guilty of a conspiracy to commit armed robbery, as charged, and it would be your duty to so find.
>
> If you fail to so find, or have a reasonable doubt as to his guilt of that, it would be your duty to find him not guilty."

In an earlier instruction the court stated:

> "So, if several people have a meeting of the minds, it does not necessarily have to be in writing or in any express language, but if there is a meeting of the minds communicated between the parties that

one is to direct or point out to others a place or a person to be robbed, and that others are to commit the robbery and that one or more of the parties are to engage in the disposing of the property taken, or in its division, then that would be a conspiracy on the part of each party entering into such an agreement whose mind met with one or more of the others as to the carrying out of those unlawful purposes."

The charge must be viewed as a whole. When so considered, the instructions do not suggest that defendant Richards could conspire with himself or that he could be guilty of conspiracy even if he had made no agreement with anyone. The contested section of the charge correctly states that defendant Richards could conspire with one or more of the others mentioned. Since there is no "and" between Cooley and Harold, defendant Richards is equated to one unit necessary for conspiracy while Cooley, Harold and Allen, together, alone or in any other combination, constitute the other necessary unit. Defendant Harold makes a similar argument. We find no error in this portion of the charge.

Both defendants complain that the court did not properly instruct on "alibi." The case was heard before the opinion in *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513. The judge was therefore required, without request, to instruct the jury as to the legal effect of defendants' evidence that they were not present at the scene of the crime. The relevant instructions were as follows:

"As to both the defendant Richards, members of the jury, and the defendant Harold, they having offered evidence tending to show that they were somewhere else on the date of the offense charged, that is what is known as evidence in the nature of alibi. Alibi means to be elsewhere and it is evidence

in denial of the one of the things that the State must prove, that is, the presence and participation of this party in the alleged criminal offense.

Evidence of alibi is to be considered by you just as any other evidence in denial of the State's contention and the State must prove beyond a reasonable doubt the defendants' presence and participation in the alleged crime.

If the State fails to prove beyond a reasonable doubt the presense and participation of Richards, then he would not be guilty. Likewise, if it failed to prove beyond a reasonable doubt the presence and participation of Harold, he would not be guilty of the charge."

The judge thus specifically told the jury that the State must prove defendants' presence and participation in the crime beyond a reasonable doubt and that if the State had failed to do so they should acquit defendants. In an earlier part of the charge the jury had been properly instructed as to the presumption of innocence and the burden the State must bear to prove guilt beyond a reasonable doubt. Surely the instruction that the State must prove defendants' presence makes it clear that defendants need not prove their absence. We find no prejudicial error in the instructions.

Several motions made by the State and defendants were heard when defendants were not present. These included motions for a special venire, consolidation of the cases, sequestration of witnesses and change in venue. Defendants were represented by able counsel who participated in the hearings on these motions and at no time did counsel suggest the absence of defendants or note exceptions to their absence. All assignments of error directed to the consideration of pretrial and other motions when defendants were not present are overruled.

Other assignments of error concern testimony by Ward as to statements defendant C. V. Cooley made during telephone conversations between Ward and Cooley after the robbery and prior to trial. The court instructed the jury to consider the evidence only in connection with the guilt or innocence of defendant Cooley. Cooley did not testify. Assuming, without declaring, that it was error to admit Ward's version of the conversation between him and one of the other alleged conspirators, we will set out Ward's testimony as to the conversation to illustrate that the error, if any, was harmless beyond a reasonable doubt.

> "A. Well, the phone rang, I picked it up, the man said, 'this is C.V.', the man from up in Louisburg', and I said, 'yeah, how did you get this phone number', I said, 'how did you know my name?' He said, 'well, Nelson left his address book laying here and I found it in that.' And he said he wanted to know what was going on, said — he asked 'how much money was in there?', and I said about fifteen hundred dollars and some bonds. He said, 'well' — I didn't tell him about the other six thousand dollars. He said, 'well, the paper up here said it was thrity or forty thousand dollars.' I said, 'well, Nelson has got these bonds, there was fifteen, twenty or twenty-five thousand dollars'. He said, 'well, I want to make sure that I get my part of the money.' He said, 'I think Nelson might try and screw out of them', told me that he would be back in touch with me and he left me a phone number in case I heard from Nelson.

EACH DEFENDANT MOVES TO STRIKE ANSWER.

MOTION DENIED.

RICHARDS' EXCEPTION NO. 11

HAROLD'S EXCEPTION NO. 9

He did leave me a phone number. I did not have any further conversation with that person at that time. I did have a conversation with this same person again at a later time. He called me and identified himself the same way. 'This is C.V., the guy from Louisburg', in return to a call that I made up here.

I called the number he had given me. A lady answered. I said 'is C.V. there?' She said, 'no', and I said 'is this the C.V. with the orange Pontiac' and she said 'yes'. I said 'do you know when he will be back', and she said, 'no'. I said 'fine'. The next day I called the same number and I called person to person for C.V. Cooley. The lady that answered the phone said he wasn't there. The operator left the number for him to call me back. She left my number. After I left my number with the lady for him to call me back, the man called back, said 'this is C.V., the man from Louisburg.' He called back the next day.

Q. What, if anything did this person tell you?

EACH DEFENDANT OBJECTS. OVERRULED.

A. He said that Nelson was flying into Atlanta with a girl, and he gave me the time of the flight and he said he thought he screwed us out of the money for the bonds. He said, 'you need to get out to the airport to find out what is going on.'

RICHARDS' EXCEPTION NO. 12

HAROLD'S EXCEPTION NO. 10

I went to the airport and Nelson Richards came in on the airplane.

Q. All right, what other conversation did you have with this man at that time?

EACH DEFENDANT OBJECTS.

COURT: OVERRULED as to the defendant Cooley. Objection SUSTAINED as to the defendants Harold and Richards, and the jury has previously been instructed not to consider that.

A. I called him back after seeing Nelson at the airport and told him I had seen Nelson out there and Nelson claimed that he had lost the bonds.

RICHARDS' EXCEPTION NO. 13

HAROLD'S EXCEPTION NO. 11

Q. How did you call?

A. I called the number —

DEFENDANT COOLEY OBJECTS.

OVERRULED BY THE COURT.

A. I called the number that the man had given me who had identified himself as 'C.V., the man from Louisburg.'

DEFENDANTS HAROLD AND RICHARDS MOVE TO STRIKE ANSWER.

DEFENDANT COOLEY OBJECTS, MOVES TO STRIKE ANSWER.

COURT: Again, members of the jury, and statements by the person on the telephone as testified by this witness are to be considered only against the defendant Cooley and not against the defendants Harold and Richards.

RICHARDS' EXCEPTION NO. 14

HAROLD'S EXCEPTION NO. 12

Q. Tell us what happened in that conversation.

A. I just told him that I had gotten in a hassel with Nelson at the airport and had slapped him and he had called the police and had me taken away, and I said that it looked like he wasn't going to give us the money for the bonds.

EACH DEFENDANT MOVES TO STRIKE ANSWER.

COURT: Motion allowed as to Harold and Richards, DENIED as to Cooley.

RICHARDS' EXCEPTION NO. 15

HAROLD'S EXCEPTION NO. 13

Q. What, if anything, did the other person say?

EACH DEFENDANT OBJECTS.

COURT: Objection OVERRULED as to Cooley, SUSTAINED as to Harold and Richards.

A. He said that he would get the money. He said that Nelson wasn't going to screw us out of it, that he would be back in touch with us, that he wasn't going to let Nelson beat us out of the money.

RICHARDS' EXCEPTION NO. 16

HAROLD'S EXCEPTION NO. 14

Q. Did you ever have any further telephone conversations with this person at any time?

A. About nine months ago.

Q. When was that?

EACH DEFENDANT OBJECTS.

COURT: Sustained as to the defendants Richards and Harold and OVERRULED as to the de-

fendant, Cooley, and again, members of the jury, any conversation this witness may testify that he had with the person who identified himself as 'C.V.' on the phone may be considered only against the defendant Cooley and not against the defendants Richards and Harold.

RICHARDS' EXCEPTION NO. 17

HAROLD'S EXCEPTION NO. 15

Q. Where were you when you had a conversation with the person again?

A. At my house.

Q. All right, now, tell us how that came about.

EACH DEFENDANT OBJECTS.

COURT: SUSTAINED as to Harold and Richards and OVERRULED as to Cooley. Go ahead.

A. The man called, said this was 'C.V.' and he said 'did you know that we have all four been indicted?' I said, 'how do you know that?' and he said, 'some friend of Collins had told him, a friend of Mike Collins, and he had found out that we had all been under indictment and we were all going to be tried.'

RICHARDS' EXCEPTION NO. 18

HAROLD'S EXCEPTION NO. 16

Q. Was there any further conversation?

EACH DEFENDANT OBJECTS.

OVERRULED BY THE COURT as to Cooley.

SUSTAINED BY THE COURT as to Richards and Harold.

A. Then he asked me where John Harold was, and I said John was in Charlotte, and then he said he would find out more about it, and he would be back in touch with me. He just said 'keep your mouth shut.'

RICHARDS' EXCEPTION NO. 19

HAROLD'S EXCEPTION NO. 17

He didn't say anything else that I can recall at this time, other than we just discussed, you know, what he had heard and he just talked about not saying anything. He said, you know, 'if you are in any kind of bad way, just let me know' or something like that, but 'don't open your mouth at all.'

I had another conversation with this same person. It was several days after that, five, six, seven days, I am not exactly sure. This was after that first phone call. It was at the same number at my house. He called me.

Q. What, if anything, was said on that occasion?

EACH DEFENDANT OBJECTS.

COURT: OBJECTION SUSTAINED as to Richards and Harold. OVERRULED as to Cooley.

A. He said that he had found out that Collins was going to testify against us and he said we might have to have him killed.

RICHARDS' EXCEPTION NO. 20

HAROLD'S EXCEPTION NO. 18

Q. Did you have any further conversation with him?

A. Yeah, he said that, 'did I think that John Harold would say anything? I said, 'I didn't think he would,' and he said, 'well, if he does, you are going to have to take care of him because I can't do anything outside of North Carolina.'

EACH DEFENDANT OBJECTS.

COURT: SUSTAINED as to Harold and Richards, DENIED as to Cooley.

RICHARDS' EXCEPTION NO. 21

HAROLD'S EXCEPTION NO. 19

DEFENDANT COOLEY OBJECTS.

OVERRULED BY THE COURT.

DEFENDANTS HAROLD AND RICHARDS OBJECTS.

SUSTAINED as to defendants Harold and Richards.

A. He said, 'we are all going to go to jail, and if anybody did any talking, that we would all be in the Raleigh State Prison, the North Carolina State Prison.' He said that his brother or somebody was a guard there and he said that we wouldn't last in there if we said anything against him."

All that Ward testified he did or told Cooley was, of course, competent. Ward was on the stand and subject to cross-examination and jury consideration of his veracity. Apparently the jury gave little credence to this and other testimony by Ward as to Cooley's involvement for Cooley was acquitted. Nothing that Cooley is alleged to have said with reference to defendant Harold is of significant value. In fact, the only references to Harold were Cooley's inquiries as to Harold's whereabouts and

whether Ward thought that Harold would say anything.

Cooley's statements as to Richards were of little more consequence. Ward's statement that Nelson (Richards) had the bonds was competent.

Cooley's alleged concern that Nelson might not share the bonds was no evidence that he had them. Cooley's later statement that Nelson was flying to Atlanta with the bonds added little to Ward's statements that he met Nelson at the airport, and that Nelson claimed he had lost the bonds and had caused Ward to be arrested after Ward slapped Nelson at the airport. There is no reasonable probability that the statements the witness Ward attributed to defendant Cooley contributed to the conviction of defendants Harold or Richards.

We have considered the other assignments of error and find them to be without such merit as to require a new trial.

No error.

Judges BRITT and PARKER concur.

EXHIBIT C

No. 31 Ninth District

NORTH CAROLINA COURT OF APPEALS

Fall Session 1974

State of North Carolina :
: *From Franklin*
Nelson Ray Richards :

NOTICE OF APPEAL

NOTICE OF APPEAL (Filed July 2nd, 1974)

TO: The Clerk of the Court of Appeals, the Clerk of the Supreme Court, and the Attorney General of the State of North Carolina:

TAKE NOTICE that the defendant appellant hereby gives Notice of Appeal to the Supreme Court of North Carolina, from the decision of the North Carolina Court of Appeals rendered herein, filed on June 5, 1974, and/-certified by the clerk of the Court of Appeals on the 17th day of June, 1974.

This appeal is taken as a matter of right pursuant to North Carolina General Statutes 7A-30(1), from a decision involving a substantial question arising under the Constitution of the United States as follows:

(1) The defendant appellant Richards' right of confrontation guaranteed by the Sixth Amendment to the Constitution of the United States made oblig.tory on the States by the Fourteenth Amendment was violated.

(2) The Court admitted telephonic statements by a co-defendant, who did not take the stand.

(3) The statements were made by the co-defendant out of the presence of the defendant appellant Richards.

(4) The statements were highly prejudicial to the defendant appellant Richards.

(5) The Constitutional question was raised in the trial Court by objections to the evidence and in the North Carolina Court of Appeals by assignment of error argued as point three of defendant appellant's brief filed with the North Carolina Court of Appeals.

(6) In the trial Court and in the North Carolina Court of Appeals this Constitutional question was passed upon and decided erroneously by the trial Court and the North Carolina Court of Appeals.

This Notice of Appeal is being given within fifteen days of the date of the certification of the Opinion of the Court of Appeals.

This the 2nd day of July, 1974.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 74-561

NELSON RAY RICHARDS,
Petitioner

vs.

THE STATE OF NORTH CAROLINA,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

The Respondent prays that the Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLIINA COURT OF APPEALS seeking review of an Order of the Court of Appeals of the State of North Carolina entered on June 5, 1974, be denied.

CITATIONS TO OPINIONS BELOW

The original opinion of the Supreme Court of North Carolina, dated August 13, 1974, has been reported in 285 N.C. 667. The judgment of the North Carolina Supreme Court dismissed the appeal of the petitioner (Respondent's Exhibit A) from an adverse opinion of the North Carolina Court of Appeals, which opinion is hereto attached as Exhibit B. The opinion of the North Carolina Court of Appeals is reported in 21 N.C. App. 686, 205 S.E. 2d 369.

JURISDICTION

This case was decided by the Supreme Court of North Carolina by an order dated August 13, 1974 and was entered on the same day. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), and further the petitioner attempts to invoke jurisdiction of this Court under the Sixth Amendment to the United States Constitution. The respondent contends that there has been no deprivation of rights secured by the Constitution of the United States and that this Court should not assume jurisdiction of this case.

QUESTIONS PRESENTED

1. Did the State violate the petitioner's right of confrontation, guaranteed by the constitution, by introducing telephonic conversations between codefendants Cooley and Ward?

2. Assuming but not declaring error, was it harmless beyond a reasonable doubt?

STATEMENT OF CASE

This was a criminal action tried at the May 1973 Session of the Superior Court of Franklin County. The defendant Richards was charged in bill of indictment No. 72CR3221 with conspiracy to commit armed robbery (R.p. 3) and in bill of indictment No. 70CR3437 with armed robbery (R.p. 5). Defendant Harold was charged in bill of indictment No. 72CR3218 with conspiracy to commit armed robbery (R.p. 6) and in bill of indictment No. 72CR3216 with armed robbery (R.p. 7). The cases were consolidated for the purpose of trial and the jury returned a verdict of not guilty as to defendant Richards as to armed robbery (R.p. 169) and guilty as to the charge of conspiracy to commit armed robbery (R.p. 170). As to the defendant Harold the jury found the defendant guilty as to the charge of armed robbery and guilty as to the charge of conspiracy to commit armed robbery (R.p. 170). Upon the pronouncement of the verdict the court sentenced the defendant Richards upon the charge of conspiracy to commit armed robbery to a term of ten (10) years (R.pp. 170-171). Upon the pronouncement of the verdict the Court sentenced the defendant Harold upon the charge of armed robbery

to a term of not less than twenty-four (24) nor more than thirty (30) years and upon the charge of conspiracy to commit armed robbery the defendant Harold was given a term of not less than one (1) nor more than ten (10) years to begin at the expiration of the sentence upon the charge of armed robbery (R.pp. 172-173). To the pronouncement of the judgment the defendant Richards excepted and gave notice of appeal to this court. (R.pp. 171-172). To the pronouncement of the judgment the defendant Harold excepted and gave notice of appeal to this court. (R.pp. 173-174). This court granted certiorari August 16, 1973 (73SC245PC and 73SC254PC).

STATEMENT OF FACTS

Defendants were indicted for conspiracy to commit armed robbery and armed robbery. C. V. Cooley was indicted for accessory before and after the fact of armed robbery and conspiracy to commit armed robbery.

The State's evidence tended to show that on November 4, 1970, two men entered the Louisburg home of Walter H. Horton, Jr. and forced Horton to open his safe. One of the men held a gun on Horton, while the other ransacked the house. The men, one of whom Horton identified as defendant John Maxwell Harold, took about $30,000.00 worth of bonds, silver coins, cash and travelers checks.

On December 13, 1970, Durham County police officers stopped an automobile owned and operated by defendant Nelson Ray Richards. Acting pursuant to a search warrant issued in a matter unrelated to that presently before the court, the officers searched the automobile. They found two debentures which were identified as belonging to Horton.

In early 1972, Georgia law enforcement officials and SBI agent Roger Allen talked with Harvey Ward in Atlanta. Ward told the officers that Cooley and Richards had planned the robbery and that he and Harold had been recruited to help Richards carry it out. Some of Horton's property was recovered from a safety deposit box Ward rented in Atlanta. Ward was a witness for the State and gave evidence tending to show that all defendants were guilty as charged.

Although the defendant Harold did not testify in his own behalf, his wife testified that in November 1970, Harold was living in Charlotte and was there on the date of the Louisburg robbery.

Defendant Richards, who said he lived in Jonesboro, Georgia, in November 1970, claimed that he had won the debentures found in his automobile in a poker game in Durham on December 6, 1970. His evidence also tended to show he was staying in an Atlanta motel when the Horton robbery occurred.

Cooley was acquitted. Richards was found guilty of conspiracy to commit armed robbery and sentenced to an active prison term of ten (10) years. Harold was found guilty of armed robbery and conspiracy to commit armed robbery. He was sentenced to 24-30 years for the first offense and 10 years on the second, the terms to run consecutively. Certiorari was granted to allow both defendants appellate review.

ARGUMENT

I.

DID THE STATE VIOLATE THE PETITIONER'S RIGHT OF CONFRONTATION, GUARANTEED BY THE CONSTITUTION, BY INTRODUCING TELEPHONIC CONVERSATIONS BETWEEN CO-DEFENDANTS COOLEY AND WARD?

It is respectfully submitted that the question raised by the Petitioner by this assignment of error was answered by the Supreme Court of North Carolina in the case of *State v. Jones*, 280 N.C. 322. The trial judge was extremely cautious in limiting the extra-judicial statement of Cooley, and testified to by Ward, to the defendant Cooley and instructing the jury not to consider the statement as against the other defendants, Richards and Harold (Respondent's Appendix 7A through 13A). In fact, the court in its charge (Respondent's Appendix 7A) instructed the jury that the evidence of the phone call was to be considered by them only as against the defendant C. V. Cooley, and not as against any other defendants.

The State contends that the defendants Richards and Harold

were not obliquely incriminated by these statements. In fact it appears that the defendant Cooley was not directly incriminated by these statements for he was acquitted. It is strongly urged by the State that any incrimination of Richards and Harold by statements attributed to Cooley was of insignificant probative value in relation to the mass of competent and admitted evidence against them, *State v. Matthews*, 20 N.C.App. 297; and even if the court committed error in permitting the statement of Cooley, that the constitutional error was harmless "beyond a reasonable doubt".

The case on appeal does not contain the cross-examination of any of the witnesses for the State or the defendants; however, it may be assumed that Ward was cross-examined by the attorneys for Richards, Harold and Cooley. The record does not reveal that Richards and Harold are now complaining that they were deprived of their right of cross-examination of the witness Ward.

The Petitioner, Nelson Ray Richards, testified in his own behalf denying the allegations of the State through the testimony of Ward (co-conspirator) and interposing the defense of alibi; also explaining that the bonds taken from Horton by force of arms came into his possession in a poker game. The declarant (Ward) was available at this time and subject to cross-examination by all of the defendants. It is well established in the law that the credibility of a witness is solely in the province of the jury. The jury may accept all of the testimony of a witness or reject all of it or accept any part. The jury rejected a part of Ward's (the declarant) testimony as to the petitioner Richards, as Richards was found not guilty of armed robbery but guilty of conspiracy. It also rejected all of Ward's testimony as to Cooley, who was found not guilty by the jury. The petitioner's claim of denial of his Sixth Amendment rights applicable to the State through the Fourteenth Amendment is further without merit. *State v. Kerley*, 246 N.C. 157, 97 S.E. 2d 876; *Nelson v. O'Neal*, 402 U.S. 22, 29 L.Ed. 2d 222, 91 S. Ct. 1723 (1971).

"If the declarant can be cross-examined, a co-defendant has been accorded his right of confrontation." *State v. Kerley*, Supra.

The decision in *Bruton* was confined to the holding that the right to confrontation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution "is violated only

where the out-of-court heresay statement is that of a declarant who is unavailable at the trial for full and effective cross-examination." *Nelson v. O'Neal*, Supra.

II.

ASSUMING, BUT NOT DECLARING ERROR, WAS IT HARMLESS BEYOND A REASONABLE DOUBT?

Associate Justice Vaughn of the Court of Appeals of North Carolina, analyzed the telephonic conversation of Ward and Cooley concerning Richards (Respondent's Appendix 7A) and came to the conclusion: "Assuming, without declaring, that it was error to admit Ward's version of the conversation between him and one of the other alleged conspirators, we will set out Ward's testimony as to the conversation to illustrate that the error, if any, was harmless beyond a reasonable doubt. ...(T)here is no reasonable probability that the statements the witness Ward attributed to defendant Cooley contributed to the conviction of defendants Harold or Richards."

This rule is well established in law and followed by this honorable court. *Gilbert v. California*, 308 U.S. 274 (1964); *State v. Taylor*, 280 N.C. 273; *Harrington v. California*, 395 U.S. 254 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

The Constitution of the United States and the State of North Carolina does not accord to any citizen a perfect trial but is constitutionally bound to see to it that each citizen receives a fair and impartial trial and the State submits that the Petitioner in this case received a fair and impartial trial.

The entire record in this case unerringly points to the guilty of the Petitioner and the relief sought should be denied.

CONCLUSION

For the reasons stated, the Respondent contends that the State did not deny the Petitioner his constitutional rights under the Sixth Amendment, applicable to the State through the Fourteenth Amendment to the United States Constitution, and the Respondent respectfully submits that this Court, therefore, should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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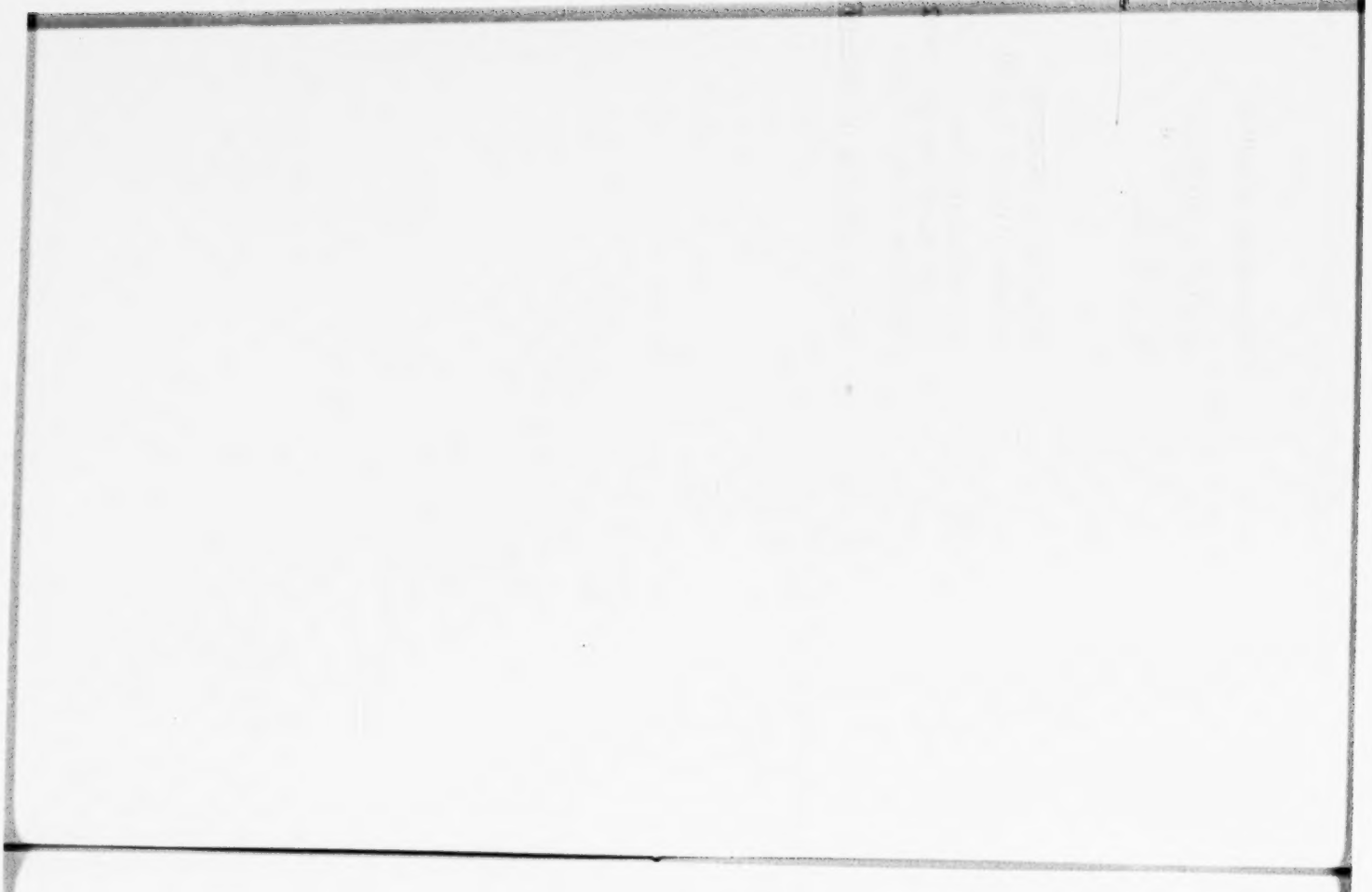

APPENDIX

EXHIBIT A

NO. 31 NINTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1974

STATE OF NORTH CAROLINA	)	JUDGMENT
	)	DISMISSING
	)	APPEAL AND
V.	)	DENYING
	)	CERTIORARI
	)	
NELSON RAY RICHARDS and	)	
JOHN MAXWELL HAROLD	)	(749SC212)

This matter came on to be considered upon motion of the Attorney General to dismiss the appeal of the defendants and upon defendants' petition for writ of certiorari; upon consideration whereof, it is adjudged by the Court here, that the motion to dismiss the appeal be allowed; that petition for writ of certiorari be denied, and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed;

And it is considered and adjudged further that the defendant Nelson Ray Richards and surety to the appeal bond, U. S. Fiedlity & Guaranty Company, do pay one half the clerk's cost of $9.00 and that defendant John Maxwell Harold do pay one half the clerk's cost amounting to $9.00 and execution issue therefor.

Witness my hand the seal of the Supreme Court, this 13th day of August, 1974.

Adrian J. Newton

Clerk of the Supreme Court of
North Carolina

EXHIBIT B

No. 749SC212 NINTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 1974

STATE OF NORTH CAROLINA

v. *From Franklin*

NELSON RAY RICHARDS and
JOHN MAXWELL HAROLD

On certiorari to review trial before McKinnon, Judge, at the April-May 1973 Session of Superior Court held in Franklin County.

Defendants were indicted for conspiracy to commit armed robbery and armed robbery. C. V. Cooley was indicted for accessory before and after the fact of armed robbery and conspiracy to commit armed robbery.

The State's evidence tended to show that on 4 November 1970, two men entered the Louisburg home of Walter H. Horton, Jr. and forced Horton to open his safe. One of the men held a gun on Horton, while the other ransacked the house. The men, one on whom Horton identified as defendant John Maxwell Harold, took about $30,000.00 worth of bonds, silver coins, cash and travelers checks.

On 13 December 1970, Durham County police officers stopped an automobile owned and operated by defendant Nelson Ray Richards. Acting pursuant to a search warrant issued in a matter unrelated to that presently before the court, the officers searched the automobile. They found two debentures which were identified as belonging to Horton.

In early 1972, Georgia law enforcement officials and SBI agent Roger Allen talked with Harvey Ward in Atlanta. Ward told the officers that Cooley and Richards had planned the robbery and that

he and Harold had been recruited to help Richards carry it out. Some of Horton's property was recovered from a safety deposit box Ward rented in Atlanta. Ward was a witness for the State and gave evidence tending to who that all defendants were guilty as charged.

Although defendant Harold did not testify in his own behalf, his wife testified that in November 1970, Harold was living in Charlotte and was there on the date of the Louisburg robbery.

Defendant Richards, who said he lived in Jonesboro, Georgia in November 1970, claimed that he had won the debentures found in his automobile in a poker game in Durham on 6 December 1970. His evidence also tended to show he was staying in an Atlanta motel when the Horton robbery occurred.

Cooley was acquitted. Richards was found guilty of conspiracy to commit armed robbery and sentenced to an active prison term of 10 years. Harold was found guilty of armed robbery and conspiracy to commit armed robbery. He was sentenced to 24-30 years for the first offense and 10 years on the second. The terms are to run consecutively. We allowed certiorari to allow both defendants appellate review.

Attorney General Robert Morgan by Lester V. Chalmers, Jr., Assistant Attorney General, for the State.

Blanchard, Tucker, Denson & Cline by Irvin B. Tucker, Jr., and Tharrington, Smith & Hargrove by Roger W. Smith, attorneys for defendant appellants.

VAUGHN, Judge. Defendant Richards contends that the court's instructions to the jury were erroneous in that they would permit defendant Richards' conviction for conspiracy "if he conspired with himself or if the defendant Ward conspired with Harold or Cooley with no connection with the defendant Richards at all." This contention involves the following portion of the court's charge:

> "On the charge of conspiracy to commit an armed robbery against the defendant Nelson Ray Richards, I instruct you if you are satisfied from the evidence beyond a reasonable doubt that there was

an unlawful meeting of the minds between Nelson Ray Richards and C. V. Cooley, John Maxwell Harold and Harvey Allen Ward, or any one or more of those persons, to commit the crime of armed robbery upon Mr. Horton, if you find those to be the facts beyond a reasonable doubt, the defendant Nelson Ray Richards would be guilty of a conspiracy to commit armed robbery, as charged, and it would be your duty to so find.

If you fail to so find, or have a reasonable doubt as to his guilt of that, it would be your duty to find him not guilty."

In an earlier instruction to the Court stated:

"So, if several people have a meeting of the minds, it does not necessarily have to be in writing or in any express language, but if there is a meeting of the minds communicated between the parties that one is to direct or point out to others a place or a person to be robbed, and that others are to commit the robbery and that one or more of the parties are to engage in the disposing of the property taken, or in its division, then that would be a conspiracy on the part of each party entering into such an agreement whose mind met with one or more of the others as to the carrying out of those unlawful purposes."

The charge must be viewed as a whole. When so considered, the instructions do not suggest that defendant Richards could conspire with himself or that he could be guilty of conspiracy even if he had made no agreement with anyone. The contested section of the charge correctly states that defendant Richards could conspire with one or more of the others mentioned. Since there is no "and" between Cooley and Harold, defendant Richards is equated to one unit necessary for conspiracy while Cooley, Harold and Allen, together, alone or in any other combination, constitute the other necessary unit. Defendant Harold makes a similar argument. We find no error in this portion of the charge.

Both defendants complain that the court did not properly instruct on "alibi." The case was heard before the opinion in *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513. The judge was therefore required, without request, to instruct the jury as to the legal effect of defendants' evidence that they were not present at the scene of the crime. The relevant instructions were as follows:

> "As to both the defendant Richards, members of the jury, and the defendant Harold, they having offered evidence tending to show that they were somewhere else on the date of the offense charged, that is what is known as evidence in the nature of alibi. Alibi means to be elsewhere and it is evidence in denial of the one of the things that the State must prove, that is, the presence and participation of this party in the alleged criminal offense.
>
> Evidence of alibi is to be considered by you just as any other evidence in denial of the State's contention and the State must prove beyond a reasonable doubt the defendants' presence and participation in the alleged crime.
>
> If the State fails to prove beyond a reasonable doubt the presence and participation of Richards, then he would not be guilty. Likewise, if it failed to proved beyond a reasonable doubt the presence and participation of Harold, he would not be guilty of the charge."

The judge thus specifically told the jury that the State must prove defendants' presence and participation in the crime beyond a reasonable doubt and that if the State had failed to do so they should acquit defendants. In an earlier part of the charge the jury had been properly instructed as to the presumption of innocence and the burden the State must bear to prove guilt beyond a reasonable doubt. Surely the instruction that the State must prove defendants' presence makes it clear that defendants need not prove their absence. We find no prejudicial error in the instructions.

Several motions made by the State and defendants were heard when defendants were not present. These included motions for a

special venire, consolidation of the cases, sequestration of witnesses and change in venue. Defendants were represented by able counsel who participated in the hearings on these motions and at no time did counsel suggest the absence of defendants or note exceptions to their absence. All assignments of error directed to the consideration of pretrial and other motions when defendants were not present are overruled.

Other assignments of error concern testimony by Ward as to statements defendant C. V. Cooley made during telephone conversations between Ward and Cooley after the robbery and prior to trial. The court instructed the jury to consider the evidence only in connection with the guilt or innocence of defendant Cooley. Cooley did not testify. Assuming, without declaring, that it was error to admit Ward's version of the conversation between him and one of the other alleged conspirators, we will set out Ward's testimony as to the conversation to illustrate that the error, if any, was harmless beyond a reasonable doubt.

> "A. Well, the phone rang, I picked it up, the man said, 'this is C.V.', the man from up in Louisburg', and I said, 'yeah, how did you get this phone number', I said 'how did you know my name?' He said, 'well, Nelson left his address book laying here and I found it in that.' And he said he wanted to know what was going on, said – he asked 'how much money was in there?', and I said about fifteen hundred dollars and some bond. He said, 'well' – I didn't tell him about the other six thousand dollars. He said, 'well, the paper up here said it was thirty or forty thousand dollars.' I said, 'well, Nelson has got these bonds, there was fifteen, twenty or twenty-five thousand dollars'. He said, 'well, I want to make sure that I get my part of the money.' He said, 'I think Nelson might try to screw out of them', told me that he would be back in touch with me and he left me a phone number in case I heard from Nelson.
>
> EACH DEFENDANT MOVES TO STRIKE ANSWER.
>
> MOTION DENIED.

RICHARDS' EXCEPTION NO. 11

HAROLD'S EXCEPTION NO. 9

He did leave me a phone number. I did not have any further conversation with that person at that time. I did have a conversation with this same person again at a later time. He called me and identified himself the same way. "This is C.V., the guy from Louisburg', in return to a call that I made up here.

I called the number he had given me. A lady answered. I said 'is C.V. there?' She said, 'no', and I said 'is this the C.V. with the orange Pontiac' and she said 'yes'. I said 'do you know when he will be back', and she said, 'no'. I said 'fine'. The next day I called the same number and I called person to person for C.V. Cooley. The lady that answered the phone said he wasn't there. The operator left the number for him to call me back. She left my number. After I left my number with the lady for him to call me back, the man called back, said 'this is C.V., the man from Louisburg.' He called back the next day.

Q. What, if anything did this person tell you?

EACH DEFENDANT OBJECT. OVERRULED.

A. He said that Nelson was flying into Atlanta with a girl, and he gave me the time of the flight and he said he thought he screwed us out of the money for the bonds. He said 'you need to get out to the airport to find out what is going on.'

RICHARDS' EXCEPTION NO. 12

HAROLD'S EXCEPTION NO. 10

I went to the airport and Nelson Richards came in on the airplane.

Q. All right, what other conversation did you

have with this man at that time?

EACH DEFENDANT OBJECTS.

COURT: OVERRULED as to the defendant Cooley. Objection SUSTAINED as to the defendants Harold and Richards, and the jury has previously been instructed not to consider that.

A. I called him back after seeing Nelson at the airport and told him I had seen Nelson out there and Nelson claimed that he had lost the bonds.

RICHARDS' EXCEPTION NO. 13

HAROLD'S EXCEPTION NO. 11

Q. How did you call?

A. I called the number –

DEFENDANT COOLEY OBJECTS.

OVERRULED BY THE COURT.

A. I called the number that the man had given me who had identified himself as 'C.V., the man from Louisburg.'

DEFENDANTS HAROLD AND RICHARDS MOVE TO STRIKE ANSWER.

DEFENDANT COOLEY OBJECTS, MOVES TO STRIKE ANSWER.

COURT: Again, members of the jury, and statements by the person on the telepnone as testified by this witness are to be considered only against the defendant Cooley and not against the defendants Harold and Richards.

RICHARDS' EXCEPTION NO. 14

HAROLD'S EXCEPTION NO. 12

Q. Tell us what happened in that conversation.

A. I just told him that I had gotten in a hassel with Nelson at the airport and had slapped him and he had called the police and had me taken away, and I said that it looked like he wasn't going to give us the money for the bonds.

EACH DEFENDANT MOVES TO STRIKE ANSWER.

COURT: Motion allowed as to Harold and Richards, DENIED as to Cooley.

RICHARDS' EXCEPTION NO. 15

HAROLD'S EXCEPTION NO. 13

Q. What, if anything, did the other person say?

EACH DEFENDANT OBJECTS.

COURT: Objection OVERRULED as to Cooley, SUSTAINED as to Harold and Richards.

A. He said that he would get the money. He said that Nelson wasn't going to screw us out of it, that he would be back in touch with us, that he wasn't going to let Nelson beat us out of the money.

RICHARDS' EXCEPTION NO. 16

HAROLD'S EXCEPTION NO. 14

Q. Did you ever have any further telephone conversations with this person at any time?

A. About nine months ago.

Q. When was that?

EACH DEFENDANT OBJECTS.

COURT: Sustained as to the defendants Richards and Harold and OVERRULED as to the defendant, Cooley, and again, members of the jury, any conversation this witness may testify that he had with the person who identified himself as 'C.V.' on the phone may be considered only against the defendant Cooley and not against the defendants Richards and Harold.

RICHARDS' EXCEPTION NO. 17

HAROLD'S EXCEPTION NO. 15

Q. Where were you when you had a conversation with the person again?

A. At my house.

Q. All right, now, tell us how that came about.

EACH DEFENDANT OBJECTS.

COURT: SUSTAINED as to Harold and Richards and OVERRULED as to Cooley. Go ahead.

A. The man called, said this was 'C.V.' and he said 'did you know that we have all four been indicted?' I said, 'how do you know that?' and he said, 'some friend of Collins had told him, a friend of Mike Collins, and he had found out that we had all been under indictment and we were all going to be tried.'

RICHARDS' EXCEPTION NO. 18

HAROLD'S EXCEPTION NO. 16

Q.. Was there any further conversation?

EACH DEFENDANT OBJECTS.

OVERRULED BY THE COURT as to Cooley.

SUSTAINED BY THE COURT as to Richards and Harold.

A. Then he asked me where John Harold was, and I said John was in Charlotte, and then he said he would find out more about it, and he would be back in touch with me. He just said 'keep your mouth shut.'

RICHARDS' EXCEPTION NO. 19

HAROLD'S EXCEPTION NO. 17

He didn't say anything else that I can recall at this time, other than we just discussed, you know, what he had heard and he just talked about not saying anything. He said, you know, 'if you are in any kind of bad way, just let me know' or something like that, but 'don't open your mouth at all.'

I had another conversation with this same person. It was several days after that, five, six, seven days, I am not exactly sure. This was after that first phone call. It was at the same number at my house. He called me.

Q. What, if anything, was said on that occasion?

EACH DEFENDANT OBJECTS.

COURT: OBJECTION SUSTAINED as to Richards and Harold. OVERRULED as to Cooley.

A. He said that he had found out that Collins was going to testify against us and he said we might have to have him killed.

RICHARDS' EXCEPTION NO. 20

HAROLD'S EXCEPTION NO. 18

Q. Did you have any further conversation with him?

A. Yeah, he said that, 'did I think that John Harold would say anything? I said, 'I didn't think he would,' and he said, 'well, if he does, you are going to have to take care of him because I can't do anything outside of North Carolina.'

EACH DEFENDANT OBJECTS.

COURT: SUSTAINED as to Harold and Richards, DENIED as to Cooley.

RICHARDS' EXCEPTION NO. 21

HAROLD'S EXCEPTION NO. 19

DEFENDANT COOLEY OBJECTS.

OVERRULED BY THE COURT.

DEFENDANTS HAROLD AND RICHARDS OBJECTS.

SUSTAINED as to defendants Harold and Richards.

A. He said, 'we are all going to go to jail, and if anybody did any talking, that we would all be in the Raleigh State Prison, the North Carolina State Prison.' He said that his brother or somebody was a guard there and he said that we wouldn't last in there if we said anything against him."

All that Ward testified he did or told Cooley was, of course, competent. Ward was on the stand and subject to cross-examination and jury consideration of his veracity. Apparently the jury gave little

credence to this and other testimony by Ward as to Cooley's involvement for Cooley was acquitted. Nothing that Cooley is alleged to have said with reference to defendant Harold is of significant value. In fact, the only references to Harold were Cooley's inquiries as to Harold's whereabouts and whether Ward thought that Harold would say anything.

Cooley's statements as to Richards were of little more consequence. Ward's statement that Nelson (Richards) had the bonds was competent.

Cooley's alleged concern that Nelson might not share the bonds was no evidence that he had them. Cooley's later statement that Nelson was flying to Atlanta with the bonds added little to Ward's statements that he met Nelson at the airport, and that Nelson claimed he had lost the bonds and had caused Ward to be arrested after Ward slapped Nelson at the airport. There is no reasonable probability that the statements the witness Ward attributed to defendant Cooley contributed to the conviction of defendants Harold or Richards.

We have considered the other assignments of error and find them to be without such merit as to require a new trial.

No error.

Judges BRITT and PARKER concur.